No. 88-256

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

M. M. WINTER,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

Petitioner, M.M. Winter,[1] files this Reply Brief to address new arguments in the brief of the Interstate Commerce Commission (ICC) and the United States of America (collectively the "Federal Respondents"), hereinafter "USA Br.," and in the brief of Burlington Northern Railroad Company and

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[1]M.M. Winter is General Chairman of the United Transportation Union (UTU) for the Burlington Northern Railroad Company (former Great Northern and SP&S Lines). Contrary to the federal respondents (USA Br. 5), UTU did not separately appear in the ICC's proceedings, nor did UTU do so in the court below.

Winona Bridge Railway Company (collectively "BN"), hereinafter "BN Br."

1. **Jurisdiction of Court of Appeals.** Petitioner has placed major reliance upon *American Farm Lines v. Black Ball*, 397 U.S. 532, 541 (1970), for the rule that the reviewing court and the ICC each have jurisdiction where a petition for judicial review to the Court, and a petition to reopen to the ICC, have been filed with respect to the same agency order; and that the concept of an indivisible jurisdiction which must be all in one tribunal or the other does not fit the statutory scheme. The Government argues that this Court's recent decision in *ICC v. Brotherhood of Locomotive Engineers*, 107 S.Ct. 2360 (19087) "establishes that the filing of a petition to reopen an agency decision makes that decision nonfinal for purposes of judicial review." (USA Br. 7). The Government reasons that the Court rejected the argument that an ICC order was reviewable despite a pending request for reconsideration, because the Court ruled that the 60-day limitation period (49 U.S.C. 2344) was tolled by the filing of a petition for reconsideration (USA Br. n.10), and that it would be "extremely incongruous" if the same agency order were "final" for purposes of jurisdiction, yet "nonfinal" for purposes of the 60-day limitation period, for there would be no limitations period applicable to a petition for review of an agency order between the date of entry, and the date of a decision by the agency on reconsideration. (Govt. Br. 10, n.11).

The Government next asserts its view that the filing of a petition to reopen plainly renders the order nonfinal is consistent with the settled practice of the courts of appeals. (USA Br. 10-11). Finally, the Government acknowledges *American Farm Lines v. Black Ball*, but says this Court has never held that the same party may simultaneously pursue judicial review and agency reconsideration. (USA Br. 11-12).

The short answer is that this Court nowhere in *ICC v. Brotherhood of Locomotive Engineers* held that a petition to reopen[2] an ICC order renders the agency order nonfinal for purposes of judicial review. Indeed, the exact opposite, for the Court held that the petitions for clarification and for reconsideration in that case did not serve to toll the period for seeking review of the basic trackage rights authorization.[3] The concept of concurrent jurisdiction does not mean an aggrieved party may file for judicial review at a time more than 60 days after a final ICC order, but prior to an ICC decision on reopening. (USA Br. 10, n.11). If one does not seek judicial review within 60 days of the first final order, one must await any subsequent ICC order on reopening.

The answer to the Government's comment, "This Court has never held the same party may simultaneously pursue judicial review and agency reconsideration," (USA Br. 11), is this court's decision in *United States v. Benmar Transp. & Leasing Corp.*, 444 U.S. 4, 5-7 (1979), where the parties successfully sought reconsideration pending judicial review. Moreover, the issue is *jurisdiction* in the reviewing court under 28 U.S.C. 2342(5) and 49 U.S.C. 10327(i) which is involved, not how such jurisdiction should be exercised in deference to ongoing ICC proceedings.

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[2]The Government and BN briefs refer to "reconsideration" as well as "reopen," throughout their texts. The two types of petitions differ. Reconsideration involves an "initial" decision, whereas a petition to reopen is not filed with respect to an initial decision, but involves an agency action subject to judicial review. 49 CFR 1115.3(f). Here, the ICC's January 7, 1988 decision was not an initial decision, but an action by the entire Commission in the first instance. Therefore, petitions to reopen were filed. 49 CFR 1115.2-3(a).

[3]The ICC's decision approving the trackage rights was served October 20, 1982, but the petitioner in that case waited until April 4, 1983 to seek "clarification" (actually reopening).

Contrary to the flurry of citations purporting to show "settled agency practice" that one cannot simultaneously seek judicial review and ICC reconsideration (USA Br. 10-11; BN Br. 7-8), the practice is to the opposite. The only decisions which even arguably agree with the Government's position are *Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985) and *ECEE, Inc. v. Federal Energy Regulatory Com'n*, 611 F.2d 554, 557 (5th Cir. 1980). The first is easily distinguished and explained. It involved an order of the Federal Aviation Administraiton, not reviewable under the Hobbs Act (28 U.S.C., 2341-50) as are ICC orders. But more important, the panel's ruling was predicated upon the 1979 amendment to Section 4 of the Federal Rules of Appellate Procedure, sustained in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). 767 F.2d at 1494. Petitions to review ICC orders are not governed by rules governing a notice of appeal from the district court. FRAP 4(a)(4) is separate and independent. *Marrese v. American Academy of Ortho. Surgeons*, 470 U.S. 373, 378-79 (1985).

The language of the court in *ECEE, Inc.* was based upon its misunderstanding of a ruling by the U.S. Court of Appeals for the D.C. Circuit. 611 F.2d at 557. Again, the case did not involve an ICC order or Hobbs Act review.[4] Cf. *Central Power and Light Co. v. United States*, 634 F.2d 137, 152-55 & n. 20 (5th Cir. 1980).

In contrast with the *Aeromar* and *ECEE, Inc.* decisions, the D.C. Circuit and the 11th Circuit have permitted simultaneous judicial review and reopening of ICC orders under the Hobbs Act. See: *Public Service Co. of Indiana, Inc. v.*

[4]The balance of the citations are way off the mark for any guidance. At most, they merely establish that a petition for reconsideration/reopening will toll the limitations of 28 U.S.C. 2344, but do not deal with jurisdiction under 28 U.S.C. 2342(5), 2344.

I.C.C., 749 F.2d 753, 758-60 (D.C. Cir. 1984); *Georgia Public Service Com'n v. United States*, 704 F.2d 538, 540 n.5 (11th Cir. 1983).[5]

2. **Final ICC Order.** The Government and BN argue that the ICC's January 7, 1988 decision was an "initial decision" not subject to judicial review, predicated upon utility or freight rate suspension decisions. (Govt. Br. 13-16; BN Br. 9-12). The rate suspension rulings have a special statutory and historical basis. See: *Aeronautical Radio, Inc. v. F.C.C.*, 642 F.2d 1121, 1234-35 (D.C. Cir. 1980).

The ICC's January 7, 1988 decision was not an "initial decision," *supra*, n.2, 49 CFR 1115.3; 49 U.S.C. 10327(i). Moreover, contrary to BN (BN Br. 4), the ICC had Winona Bridge's response to the petition to reject at the time of the January 7, 1988 decision, and the agency said so in its January 7, 1988 decision. (Pet. 21a).[6] The ICC's grant of trackage rights to Winona Bridge is "operative," and the reliance placed upon injunctive relief granted by another court on other issues (Govt. Br. 7, n.8; BN Br. 4, n.5) is not ground for dismissing the petition for review.

There is nothing in the Staggers Act to suggest that the ICC can place trackage rights agreements into effect immune from prior judicial examination. The Government relies upon language from the Conference Report. (Govt. Br. 13-14).

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[5]The D.C. Circuit opinion may have added significance as it was written by the author of the dissent in *Brotherhood of Locomotive Engineers v. I.C.C.*, 761 F.2d, 714, 726-29 (D.C. Cir. 1985), whose jurisdictional views were largely followed by this Court's majority in *ICC v. Brotherhood of Locomotive Engineers*.

[6]Although Winona Bridge and BN participated in the court below (BN Br. 1, n.1), BN was absent at the ICC. Judge Fagg, dissenting, terms it "farcical" for the ICC to "countenance the charade at hand." 851 F.2d at 1064-65. (Pet. 18a).

However, the statutory language does not suggest such agency power (49 U.S.C. 10505), and the controversial Conference Report was not available to members of Congress prior to consideration of the legislation. See: Eckhardt, Robert C., *Western Coal Traffic League Case*, 13 Transp. L.J. 307, 314-17 (1984).

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition for a writ of certiorari, this Court should issue a writ of certiorari.

Respectfully submitted,

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